AGUS v. PP

HIGH COURT MALAYA, JOHOR BAHRU
SABIRIN JA'AFAR JC
[CRIMINAL REVIEW NO: MTJB (2) 43-50-10-2014]
14 NOVEMBER 2014

CRIMINAL PROCEDURE: *Appeal – Confiscation and forfeiture – Confiscation of ship used for smuggling diesel – Order of Sessions Court Judge – Application for revision – Whether ship could be confiscated only if ship owner was charged and convicted – Whether confiscation wrong in law – Whether stay to keep ship under custody should be allowed – Control of Supplies Act 1961 (Revised 2006), s. 26(1) – Federal Constitution, art. 13*

CRIMINAL PROCEDURE: *Appeal – Sentence – Appeal against sentence – Accused charged for smuggling diesel – Plea of guilt – Fine of RM100,000 in default six months imprisonment imposed by Sessions Court Judge – Application for revision – Whether High Court could hear application for revision upon affirming sentence during appeal – Failure of prosecution to tender chemist report to ascertain whether oil seized was in fact diesel – Whether conviction a miscarriage of justice*

The accused, a captain of a ship called 'Selina', was charged under s. 20(1) of the Control of Supplies Act 1961 ('the Act') for smuggling diesel. The unrepresented accused pleaded guilty to the charge and was fined RM100,000 in default six months imprisonment by the Sessions Court Judge ('SCJ'). This was the maximum sentence allowed under the law. The court also ordered that the ship 'Selina' be confiscated. The accused did not pay the fine and was imprisoned. Dissatisfied, the accused filed an appeal against the sentence to the High Court. The High Court refused the appeal and affirmed the sentence imposed by the SCJ. Prior to the hearing of the appeal, the accused wrote to the previous High Court Judge and sought for a revision as there were some facts discovered from the notes of proceedings and grounds of judgment that could render the conviction of the accused wrong in law. The accused argued that the failure of the prosecution to tender the chemist report to ascertain that the oil seized was in fact diesel had rendered the charge unproven and thus the conviction was a miscarriage of justice. To support its contention, the accused made a comparison to dangerous drugs cases where the prosecution must tender the chemist report as exhibit before the court could convict the accused. As for the confiscation of 'Selina', the accused argued that if the ship owner was charged and convicted, only then it was right to confiscate the ship. However, in the present case, the accused was merely the captain of the ship and the confiscation was wrong in law. On the contrary, the Deputy Public Prosecutor ('DPP') objected to the revision on the ground that the High Court had already affirmed the sentence during appeal and further applied for a stay to keep 'Selina' under custody for another hearing in the Sessions Court in respect of other charges.

Held (allowing revision in part):

(1) The SCJ had mentioned 'penjara sehingga tiga tahun' ahead of 'denda tidak melebihi RM100,000' Although the provision provided that both sentences could be imposed together, the sentencing judge must follow strictly the wording of the law as the provision provided for a penalty of fine first. It was only in default of a fine that the imprisonment sentence could be imposed. (para 9)

(2) The court could still hear the appellant's complaints under its power of revision, more so when the accused was unrepresented during the trial below and the appeal was only confined to sentencing. The power of revision is discretionary and the duty was with the High Court to see that the criminal law was properly administered by the inferior court. It is a judicial duty for an appellate court to give opportunity to an aggrieved person who felt that he was slighted in the inferior court. (paras 15 & 17)

(3) The seizure of the diesel in the Act was different to seizure of dangerous drugs under the Dangerous Drugs Act. Accordingly, the nature of diesel oil was marked distinctly from other oils. It was suffice for the accused to admit his guilt after exhibits were shown in such cases. The accused, being the captain of the vessel, knew the exact nature of diesel due to the fact that diesel was used as fuel for the type of vessel he piloted. The accused had further admitted his guilt and he understood the nature and consequences of his plea despite the admonition of the SCJ. Thus, the Sessions Court was correct in law to convict the accused. (para 20)

(4) From the proper construction of s. 26(1) of the Act, confiscation could only be done to the property of the accused. The phrase "by means of which the offence has been committed or which is intended to be used" must be read together. The courts must take extra effort to scrutinise the facts surrounding the ownership of the property in question pursuant to art. 13 of the Federal Constitution. On the facts, the vessel was involved in the commission of the offence. The ship owner and the cargo owner did not necessarily be of the same persons or entity. Since the accused had already been sentenced to the maximum fine, it would be an injustice if the ship owner who could be innocent or uninformed of the true nature of the vessel's activity were vicariously punished. (paras 25 & 28-30)

(5) The court allowed the revision on the issue of the confiscation of the ship and made an order that 'Selina' be released to the owners. However, no other orders were made in regards to other issues in the revision as they were given adequate hearing and consideration during the appeal. However, a stay to keep 'Selina' was allowed because the ship was foreign-flagged and once released there was a strong possibility that it would sail away from the Malaysian territorial sovereignty. Therefore, for the best interest in future cases which the 'Selina' was involved in that it was kept under custody. (paras 34 & 36)

Case(s) referred to:
Liaw Kwai Wah & Anor v. PP [1987] 1 CLJ 35; [1987] CLJ (Rep) 163 SC ***(refd)***
Sau Soo Kim v. PP [1975] 1 LNS 158 FC ***(refd)***

Legislation referred to:
Control of Supplies Act 1961, ss. 20(1), 22(1), 26
Federal Constitution, art. 13(1)
United Nations Convention on the Law of the Sea 1982, arts. 37, 38(1)

For the applicant - Paul Krishnaraja; M/s Paul, Amy Chong and Assocs
For the respondent - Tay Lee Ly (Khairul Fikrie Zubaidi with her); DPPs

[Appeal from Session Court, Johor Bahru; Arrest Case No: 62-5007-2014]

Reported by Sandra Gabriel

JUDGMENT

Sabirin Ja'afar JC:

[1] The issues of the revision are:

(i) Whether the conviction of the appellant can be sustained when one of the ingredients of the charge ie, the diesel was not scientifically proven when tendered as exhibit during sentencing.

(ii) Whether the confiscation of a vessel detained during smuggling of diesel is legal in view of s. 26 Control of Supplies Act 1961 (Revised 2006) hereinafter "the Act".

The Background Facts

[2] On 16 July 2014 the applicant/accused was charged under s. 20(1) of the Act in the Johor Bahru Sessions Court and pleaded guilty. The accused was unrepresented. The learned Sessions Judge fined him to RM100,000 in default six months imprisonment. It is the maximum fine allowed under the law. The court also ordered that the ship "Selina" confiscated ("dilucuthak"). The applicant, an Indonesian citizen and the captain of the ship, did not pay the fine and was imprisoned.

[3] On 27 July 2014 the applicant filed a notice of appeal against the sentence. Subsequently, on 26 August 2014 the applicant filed in the petition of appeal.

[4] The appeal against the sentence was heard on 20 October 2014. Mr Paul Krishnaraja, the learned counsel for the appellant argued against the conviction and sentence to which Datin Tay Lee Ly, the learned Deputy Public Prosecutor for the respondent objected stating that the notice of appeal was only for the sentence and not conviction.

[5] This court agreed with the respondent and heard only submissions on the sentence.

A **The Appeal On Sentence**

[6] Section 22(1) Control of Supplies Act 1961 (revised 2006) provided for, upon conviction, the offender shall be liable to a fine not exceeding RM100,000 or to imprisonment for a term not exceeding two years or to both, and for a second or subsequent offence, to a fine not exceeding
B RM26,000 or to imprisonment for a term not exceeding five years or to both.

[7] The learned Sessions Judge in his grounds of judgment explained the reasons for sentencing the accused to the above sentence as below:

> Sebelum saya menjatuhkan hukuman terhadap OKT, saya telah
C menimbang rayuan ringan hukuman OKT dan juga hujahan oleh TPR. Saya mengambil kira pengakuan bersalah OKT. Pengakuan bersalah OKT sememangnya telah menjimatkan masa mahkamah. Walau bagaimanapun kesalahan yang dilakukan oleh OKT adalah satu kesalahan yang serius. Seperti yang dihujahkan oleh TPR, penyeludupan minyak diesel adalah masalah yang dihadapi Negara. Tidak ada faktor-faktor yang meringankan
D hukuman yang memihak kepada OKT untuk Mahkamah menjatuhkan hukuman yang ringan. Berdasarkan kepada keadaan dan fakta kes ini serta kepentingan awam Mahkamah tidak memberi diskaun kepada pengakuan bersalah OKT. Mahkamah perlu menjatuhkan hukuman denda yang maksima agar ianya menjadi pengajaran kepada OKT untuk tidak mengulangi kesalahan yang sama dan kepada orang awam untuk
E tidak melakukan kesalahan yang sama. Mahkamah menjatuhkan hukuman denda RM100,000 kalau tidak bayar 6 bulan penjara. (see page 15 of the Appeal Record).

[8] Realising the nationality of the appellant and his disadvantage of not having a counsel to defend him the learned Sessions Judge had asked him:

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> Mahkamah: Kamu faham akibat dan kesan pengakuan salah kamu? Kamu boleh dipenjara sehingga 3 tahun atau denda tidak melebihi RM 100,000-00? Perbicaraan tidak akan diadakan, saksi-saksi tidak akan dipanggil oleh pendakwaan. Mahkamah sekiranya menerima pengakuan salah kamu,
G sekiranya kamu mengakui fakta kes boleh menjatuhkan hukuman penjara seperti yang dikatakan saya tadi, selepas mendengar daripada kamu. Masih lagi mengaku salah?
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> OKT: Saya masih mengaku salah. (page 8, Rekod Rayuan Jenayah No. 42H-17-08/2014)

H **[9]** It is observed that the learned Sessions Judge mentioned "penjara sehingga tiga tahun" ahead of "denda tidak melebihi RM100,000". Although the provision provides that both sentences can be imposed together, I think it is better for a sentencing judge or a Magistrate to follow strictly to the wording of the law. As can be seen, the provision provides for a penalty of
I fine first. It is only in default of payment of fine that the imprisonment sentence can be imposed.

[10] The learned Deputy Public Prosecutor for the respondent tendered a newspaper cutting as a reference for this court to consider the effect of diesel smuggling to the economy of the country. It was reported by the New Straits Times dated 25 October 2014 that last year (2013) the Government spent RM9.92 billion on the diesel subsidy, more than double the RM4.03 billion it spent in 2010. At the same time, the Government lost 3.5 billion litres of subsidised diesel to smuggling. The fact was also taken into consideration by the learned Sessions Judge.

[11] At the end of the hearing of submissions this court refused the appeal and the sentence of RM100,000 fine in default six months imprisonment was affirmed. It is the opinion of this court that the learned Sessions Judge had exercised his power correctly and judiciously.

The Revision

[12] Prior to the hearing of the appeal the appellant/accused's solicitors wrote to the previous judge of this court asking for a revision stating that only after receiving the notes of proceeding and the grounds of judgment did they discover some facts which, they argued, could render the conviction of the appellant/accused wrong in law and applied for a revision to correct the mistake.

[13] This court fixed the hearing of the revision on 26 October 2014.

[14] The application for revision was objected to by the learned Deputy Public Prosecutor for various reasons mainly this court had already heard and affirmed the sentence and there was nothing more to decide.

[15] To this, this court's answer is, the court could still hear the appellant's complaints under its power of revision. More so when the accused was unrepresented during the trial below and the appeal was only confined to sentencing. It is trite law that the power of revision is discretionary and basically, the duty lies with the High Court to see that the criminal law is properly administered by an inferior court (per Abdul Hamid CJ (Malaya) in *Liaw Kwai Wah & Anor v. PP* [1987] 1 CLJ 35; [1987] CLJ (Rep) 163; [1987] 2 MLJ at p. 70.

[16] It is for the interest of justice and to show that justice is administered fairly that this court allowed the revision to proceed. This court takes heed of a reminder by Lee Hun Hoe CJ (Borneo) while delivering the majority decision of the Federal Court in *Sau Soo Kim v. PP* [1975] 1 LNS 158; [1975] 2 MLJ at pp. 135 and 136:

> ... This makes clear that where an accused person has pleaded guilty and been convicted on his own plea there shall be no appeal except as to the extent or legality of the sentence. Where an accused, as in the case of the appellant, is legally represented at the trial, the proviso should be adhered to strictly. But, where an accused person is not represented by counsel at the trial then perhaps an appellate court should peruse the

A record of the trial carefully to satisfy itself that there is no irregularity giving rise to miscarriage of justice. Being unrepresented he would not have the benefit of legal advice. It is thus proper for an appellate court in such situation to correct miscarriage of justice arising from misconception of law, irregularity of procedure or apparent harshness of treatment resulting in injury or undue hardship to such an accused. For
B example, if an accused pleaded guilty to a charge which creates no offence known to law and further the facts also disclose no offence, clearly such a conviction could not be allowed to stand. Surely, such a plea of guilty to what is not an offence is no plea at all.

[17] I think it is a judicial duty for an appellate court to give opportunity
C to an aggrieved person who feels that he was slighted in the inferior court. To my mind, the fact that the notice of revision is filed late, as contended by the learned Deputy Public Prosecutor, is not as important as for the court to provide an opportunity for him or his counsel to argue any point of law not presented or argued in other avenues. A criminal court has a duty to open
D its door to hear arguments however absurd it may sounds so long it is provided for in law. The door for the argument is in a revision.

[18] On the issue of diesel, the respondent had attempted to tender the chemist report during the hearing of revision through an affidavit of one Ernie Yusnita binti Mohd Noor (an assistant enforcement officer of the
E Ministry). The affidavit was affirmed on 26 October 2014 ie, the same day of the hearing of the revision. This is late by any account. In my view the chemist report should have been normally tendered during the sentencing process below to allow the sentencing judge an opportunity to consider it. However in the chemist report the liquid seized was stated to be diesel.

F **First Issue Of The Revision**

[19] The appellant's counsel submitted that the failure of the prosecution to tender chemist report to ascertain that the oil seized was in fact diesel had rendered the charge unproven and the conviction a miscarriage of justice.
G Mr Krishnaraja argued that it is the main ingredient and the subject matter of the charge, failing which a conviction is unsustainable and the learned Sessions Judge was wrong in convicting the applicant/accused. The counsel made comparison to the dangerous drugs cases where the prosecution must tender the chemist report as exhibit before the court could convict an accused.

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[20] With respect, this court could not agree to the submission because seizure of diesel in the Act is vastly different to seizure of dangerous drugs under DDA. In this case, there are some other supporting documents tendered as exhibits such as the tank lorry and photographs, all had been
I admitted by the applicant/accused. Similarly, the nature of diesel oil is markedly distinct from other oils be them cooking oils or petrol oil. It is sufficient for an accused to admit his guilt after being shown the exhibits in

such cases. In the present case the applicant/accused was the captain of the vessel. Surely under these circumstances he knew the exact nature of diesel due to the fact that diesel is used as fuel for the type of vessel he piloted. The applicant/accused had admitted his guilt and he understood the nature and consequences of his plea despite the admonition of the learned Sessions Judge. The Sessions Judge was correct in law to convict him.

[21] For the above stated reasons this court did not alter the conviction of the applicant.

The Second Issue Of The Revision

[22] As for confiscation of the vessel "Selina" it was argued before this court that it was wrong in law as the applicant/accused was just a captain of the vessel. He was not the owner. The learned counsel argued that if the shipowner was charged and convicted then it was right to confiscate the vessel.

[23] This court is well aware of the protection of one's property under art. 13 of the Federal Constitution. It is with that in mind this court approaches the wording of the provision in question.

[24] Section 26(1) of the Act reads:

> Where any person is convicted of an offence against this Act the court may order the confiscation in whole or in part of:
>
> (a) any controlled article in respect of which the offence has been committed which has been seized by, or has otherwise come into the possession of the Controller or any person acting under his authority or any vehicle, vessel or other article, t**he property of the accused**, by means of which the offence has been committed or which is intended to be used for the commission of an offence against this Act; or
>
> (b) ...
>
> (emphasis is added)

[25] It would appear from the construction of the provision, read as a whole, could only mean that the confiscation can only be done to the property of the accused. I take it that it means the property owned by the accused. The word "the" has a special purpose here as it gives a definite clue to the preceding phrase and true purpose of the whole construction.

[26] Although the respondent had argued at length on the interpretation of s. 26(1) of the Act and argued that "disjunctive" interpretation should be applied, this court is of the view that the following phrase "by means of which the offence has been committed or which is intended to be used" must be read together. I dread to think that if someone is caught doing some illegal activities with someone else's property, that property can be confiscated

without the real owner be called to explain. In the present case, the confiscation of the "Selina" can only be done if her owner(s) is charged and convicted. That would give the provision its proper and justiciable meaning.

[27] This also does not negate the fact that the court's power of confiscation is purely discretionary in the Act.

[28] When there is power to confiscate a property used in the commission of an offence, the court must take extra efforts to scrutinise the facts surrounding the ownership of the property in question. This is to give effect to art. 13 of the Federal Constitution.

[29] In the instant case, a vessel was involved in the commission of the offence. Under shipping law and practice, ownership of a vessel is different from ownership of some other properties. The nature of shipping is international. A ship in normal circumstances is owned by body corporate or a group of people. Under the flag of convenience a vessel is owned by a party and chartered on long charter to another. The task of determining the true owners of a vessel is difficult and daunting. The shipowner(s) and the cargo owner(s) do not necessarily be of the same persons or entity.

[30] It was undisputed fact that the accused was the captain of the vessel. It is my view that the applicant/accused had already been sentenced to the maximum fine and this is a great lesson to him and to future offenders. Here it would be an injustice if the shipowner(s) who could be innocent and misinformed or uninformed of the true nature of the vessel's activities are vicariously punished.

[31] In passing I would like to say this: a ship which is on arrest or under confiscation by the authorities has to be continued fuelled and manned to keep it floating. This requires some of the crew to remain on board. Their welfare must be taken into consideration and the court must take judicial notice of this. The court cannot be oblivious to the plight of the languishing crew, some may be foreigners who were caught in the middle during the enforcement exercise. This issue has been discussed at length in many literatures. For a good reference material, read Alistar Couper, et. al, (1999) *Voyages of Abuse: Seafarers, Human Rights and International Shipping*, London, Pluto, which highlights the problem in well-researched case studies around the world. This is more so in a ship under flag of convenience similar to the "Selina".

[32] On the protection of property the Federal Constitution provides under art. 13(1) that:

> No person shall be deprived of property save in accordance with law.

[33] With this in mind and the fact that the confiscation of the vessel in the Act is purely the discretion of the court as fortified by the word "may", this court allowed the return of the vessel "Selina" to her owners.

[34] For the reasons stated above, this court allowed the application of the revision in so far as the issue of the confiscation of the ship is concerned and made the order that the ship "Selina" be released to the owners. No other orders were made in regard of this revision as they were given adequate hearing and consideration during the appeal which was heard earlier.

The Stay Of Execution

[35] The learned Deputy Public Prosecutor applied for a stay to keep the ship "Selina" under custody for another hearing in the Sessions Court in respect of other charges.

[36] This court allowed the stay because the ship is foreign-flagged and once released there is a strong possibility it will sail away from Malaysia's territorial sovereignty. The possibility is fortified with the fact that the ship is currently detained in Johor waters adjacent to the Strait of Singapore. Internationally, the Strait of Singapore is considered part of the larger Straits of Malacca which is categorised as a strait used for international navigation under the United Nations Convention on the Law of the Sea 1982 ("The Convention"). Malaysia is signatory to the Convention. For this category of strait, the navigation regime of transit passage applies (see, arts. 37 and 38(1) of the Convention). Ships plying the straits enjoys non-suspendable innocent, uninterrupted and unimpeded passage. Having that in mind, this court is of the view that it is for the best interest of future cases which the "Selina" is involved in that she is kept under custody pending hearing of those trials.

Order accordingly.